



PUBLIC WATER SUPPLY SUPERVISION PROGRAM

FAX COVER



Date : August 22, 2000

Num. of Pages : 6

To : Mike Lowy

Location : CDA Region 2

From : Oreida Santiago

Subject : Attorney General Opinion

Message

Lowy:

This is the AG, signed yesterday.
Please, note that it is different from
the previous opinion sent to you as a draft.

We have day off due to Hurricane
Kelley. I'll contact you tomorrow.
I will send the package by Fed Ex, today
Thanks, Oreida

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*The Attorney General
San Juan, Puerto Rico*

August 21, 2000

Ms. Jeanne M. Fox
Regional Administrator
Environmental Protection Agency
Region II
290 Broadway
New York, New York 10007-1866

Re: Puerto Rico's Primacy Revision Application-Safe Drinking Water

Dear Ms. Fox:

According to the requirements established in Title 40 of the Code of Federal Regulation ("CFR"), §142.12, the Puerto Rico Department of Health ("PRDOH") has to obtain approval of program revisions undertaken to adopt the National Primacy Safe Drinking Water Regulations as promulgated in 40 CFR Part 141 (the "NPSDWR") in order to demonstrate its primary enforcement responsibility ("Primacy"). In its efforts to evidence its Primacy, the PRDOH has requested that we issue an opinion regarding its legal authority to adopt the amendments to the Safe Drinking Water Act ("SDWA") introduced in 1996 by Public Law 104-182 (the "SDWA Amendments"). We must also opine as to whether the PRDOH has duly incorporated the SDWA Amendments and if the adoption of said amendments has been done by adequate and enforceable means.

PRDOH's Role as Local Agency with Primacy

Puerto Rico Act No. 5 of July 21, 1977, 12 L.P.R.A. §1551, et seq., also known as the "Act to Protect the Purity of Drinking Water of Puerto Rico," (the "APPDWPR") authorized the Secretary of the PRDOH to protect the purity of the drinking water in Puerto Rico. Pursuant to the authority delegated in the APPDWPR, the Secretary of the PRDOH should issue appropriate regulations fixing the maximum contaminant levels for drinking water according to the criteria established by the Administrator of the Environmental Protection Agency. Puerto Rico Act No. 193, approved by the Puerto Rico Legislature on December 28, 1997, reasserted the PRDOH's primary responsibility for protecting the purity of drinking water and public health, in general, in this jurisdiction.

Regulation No. 50 adopted by the PRDOH on June 20, 1983, also known as "Regulation to Protect the Purity of the Drinking Water of Puerto Rico," ("Regulation 50") and its subsequent amendments were adopted to comply with the delegated power and responsibilities of the PRDOH under the APPDWPR and for the PRDOH to adequately function as the state agency with Primacy. On February 4, 2000, in an effort to update and clarify its role as the agency with

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Primacy in this jurisdiction, the PRDOH adopted Regulation No. 6090, also known as the "General Regulation of Environmental Health," ("PRDOH Regulation No. 8090") and derogated Regulation No. 50. For the sake of evidencing its unequivocal intent to comply with all SDWA requirements and with the SDWA Amendments, in particular, in Article II §1.02 of PRDOH Regulation No. 6090 the PRDOH adopted the totality of 40 CFR Part 141, as amended from time to time, by reference.

Requirements for a Showing of Primacy

We proceed to analyze the requirements established in the NPSDWR for a showing of Primacy and the local statutes and regulations that serve to grant Primacy to the PRDOH.

1. Under 40 CFR §142.10 (a), in order to establish its primary responsibility for public water systems, the PRDOH must adopt drinking water regulations no less stringent than those imposed by the NPSDWR.

In compliance with this requirement, the PRDOH Regulation No. 6090 establishes in its Article II §1.02 that primary standards for drinking water will be fixed and regulated according to 40 CFR Part 141, as amended. Article II §1.06 (1) of PRDOH Regulation No. 6090 goes even farther than the requirement established in 40 CFR § 142.10 in as much as, in order to protect public health, it grants to the Secretary of the PRDOH the authority to impose more stringent standards on drinking water safety than those established on the SDWA and the CFR.

2. In 40 CFR § 142.10 (b)(2) it is required that the PRDOH systematically perform sanitary surveys of public water systems, prioritizing on water systems violating primary drinking water regulations.

PRDOH Regulation No. 6090 adopted in its Article II §1.02, by reference, all requirements contained in 40 CFR Part 141, as it may be amended from time to time.

3. According to 40 CFR §142.10 (b)(6)(i), the PRDOH must have authority to apply its primary drinking water regulations to all public water systems in Puerto Rico. The PRDOH must also have statutory or regulatory enforcement authority adequate to assure compliance with locally adopted primary drinking water regulations, as necessary.

Section 3 of the APPDWPR, 12 L.P.R.A. §1551, et seq., authorizes the PRDOH to enforce drinking water regulations applicable to all water systems for human consumption.

In Chapter II, Article II §1.04 of the PRDOH Regulation No. 6090, the PRDOH is authorized (a) to require that all water systems in Puerto Rico comply with NPSDWR requirements regarding safe drinking water, and (b) to immediately close any facility violating said requirements.

4. 40 CFR §142.10 (b)(6)(ii) requires that the PRDOH be able to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of the State's primary drinking water regulations.

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Section 5 of the APPDWPR, 12 L.P.R.A. §1551, et seq., authorizes the Secretary of the PRDOH to take any actions deemed necessary to protect a water system and its users' health. These actions include, but are not limited to, the commencement of a civil suit and the request of a permanent or temporary injunction.

5. Under 40 CFR §142.10 (b)(6)(iii), the PRDOH must have right of entry and inspection of public water systems, including the right to take water samples, whether or not it has evidence of violations of an applicable legal requirement.

Section 3 of the APPDWPR, 12 L.P.R.A. §1551, et seq., authorizes the Secretary of the PRDOH to conduct inspections and perform monitoring on water systems for human consumption.

Chapter I, Article IX § 2 of the PRDOH Regulation No. 6090 authorizes the inspection by the PRDOH of any drinking water system without previous notice.

Chapter I, Article IX § 5 of the PRDOH Regulation No. 6090 authorizes the Secretary of the PRDOH to take and analyze samples on water systems or any of its components to determine water quality and purity.

6. 40 CFR §142.10 (b)(6)(iv) requires that the PRDOH require suppliers of water to keep appropriate records and make appropriate reports to the State.

Article II §1.02 of the PRDOH Regulation No. 6090 adopted the 40 CFR Part 141, as amended, by reference.

Chapter I, Article IX § 5 of the PRDOH Regulation No. 6090 authorizes the Secretary of the PRDOH to require and examine any record from facilities or systems under its jurisdiction, as deemed necessary.

7. In order to comply with the requirements of 40 CFR §142.10 (b)(6)(v), the PRDOH must be authorized to require public water systems to give public notice according to requirements established in 40 CFR §§ 141.32 and 142.16 (a), respectively.

Section 7 of the APPDWPR, 12 L.P.R.A. §1551, et seq., requires a water system that is, in any way, in noncompliance with drinking water standards to immediately notify the nature and extent of the situation and its possible adverse health effects the local health office, the Secretary of the PRDOH and the media in the area served by the system. If the Secretary of the PRDOH so requires, said notice must be published in a daily newspaper of general circulation while the violation or variance exists, and must be included in water bills issued to system users. Article II §1.02 of the PRDOH Regulation No. 6090 adopted, by reference, the 40 CFR Part 141, as amended.

8. 40 CFR §142.10 (b)(6)(vi) requires that the PRDOH have authority to assess civil or criminal penalties for violation of the local primary drinking water regulations and public notification requirements, including the authority to assess daily penalties or multiple penalties when a violation continues.

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Section 9 of the APPDWPR, 12 L.P.R.A. §1551, et seq., authorizes the Secretary of the PRDOH to impose civil penalties not greater than five thousand dollars (\$5,000.00) per day per violation of the APPDWPR, of regulations adopted by the PRDOH regarding drinking water, or of any administrative order issued relating to this matter.

Chapter III of the PRDOH Regulation No. 6090 authorizes the imposition of criminal penalties not greater than five thousand dollars (\$5,000.00) per day per violation of Section I of Regulation No. 6090.

Violation of public notice requirements would constitute a violation of both of the APPDWPR and PRDOH Regulation No. 6090.

9. Pursuant to the requirements in 40 CFR §142.10 (b)(6)(vii), the PRDOH must be authorized to require consumer confidence reports to all community water systems. Said reports must be prepared according to 40 CFR Part 141, subpart O.

Article II §1.02 of the PRDOH Regulation No. 6090 adopted, by reference, 40 CFR Part 141, as amended from time to time.

10. Under 40 CFR §142.10 (d)(1), if the PRDOH allows small system variances pursuant to Section 1415(e) of the SDWA, it must provide procedures no less stringent than the SDWA and Subpart K of this part.

Section 4 of the APPDWPR, 12 L.P.R.A. §1551, et seq., authorizes the Secretary of the PRDOH to grant variances and exemptions to drinking water regulations, provided they are authorized under conditions not less rigorous than variances or exemptions allowed under federal law.

11. As required pursuant to 40 CFR §142.10 (d)(2), if the PRDOH permits other type of variances, or exemptions, or both, from local primary drinking water regulations, it shall do so under conditions and in a manner no less stringent than the requirements of §§ 1415 and 1416 of the SDWA. In granting these variances, the State must adopt EPA Administrator's findings of best available technology, treatment techniques, or other means available as specified in Subpart G of this part.

Article II §1.02 of the PRDOH Regulation No. 6090 adopted 40 CFR Part 141, as amended, by reference, and Article II §1.05 of said regulation authorizes variances and exemptions only according to 40 CFR Part 141.4.

12. 40 CFR § 142.10(e) requires the adoption and implementation of an adequate plan for the provision of safe drinking water under emergency circumstances including, but not limited to, earthquakes, floods, hurricanes, and other natural disasters.

Section 6 of the APPDWPR, 12 L.P.R.A. §1551, et seq., directs the Secretary of the PRDOH to promulgate a plan to supply drinking water in emergency circumstances, and authorizes the Secretary of the PRDOH to take any measures deemed necessary to supply it. The plan has been adopted and is periodically revised to reflect any relevant change of

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circumstances in the Island or its infrastructure, and changes regarding agency officials to be contacted.

13. 40 CFR §142.10 (f)(1) requires that the PRDOH have authority for assessing administrative penalties of at least \$1,000 per day, per violation, for public water systems serving a population of more than 10,000 individuals. For public water systems serving a population of 10,000 or fewer individuals the penalties to be imposed by the PRDOH must be adequate to ensure compliance with local regulations. As long as these criteria are met, the maximum administrative penalty per violation to be assessed on a public water system may be determined by the PRDOH.

Section 9 of the APPDWPR, 12 L.P.R.A. §1551, et seq., authorizes the Secretary of the PRDOH to impose civil penalties not greater than five thousand dollars (\$5,000.00) per day, per violation of the APPDWPR, of regulations adopted by the PRDOH regarding drinking water, or of any administrative order issued relating to this matter.

Chapter III of the PRDOH Regulation No. 6090 authorizes the imposition of criminal penalties not greater than five thousand dollars (\$5,000.00) per day per violation of regulations contained on Section I of PRDOH Regulation No. 6090.

Administrative Order No. 2000-27500 Issued on August 18, 2000, by the Secretary of the PRDOH specifically requires that any penalty imposed on public water systems serving a population of more than 10,000 individuals must be of at least \$1,000 per day per violation, and for public water systems serving a population of 10,000 or less individuals, penalties assessed must adequately deter future violations of applicable regulations.

14. The state agency must administer a Public Water Supply Supervision Program ("PWSS") pursuant to Section 1413 of the SDWA.

The PRDOH administers its PWSS pursuant to Section 1413 of the SDWA and the primary enforcement authority delegated to the PRDOH by the Administrator of the EPA, through communication dated March 1, 1980.

The preceding analysis of the authorities and functions delegated to the PRDOH in the previously reviewed statutes and regulations reveals, in our opinion, that the PRDOH is fully authorized by the APPDWPR to adopt and enforce the SDWA Amendments, that the referenced amendments have been lawfully adopted by the PRDOH and are enforceable through legally adequate means.

Respectfully,



Edda Serrano Blasini
Deputy Attorney General